No. ____

In the

Supreme Court of the United States

October Term, 1958

STATE OF OHIO on the relation of Paul J. Klapp
Prosecuting Attorney
Petitioner

vs.

THE DAYTON POWER & LIGHT CO. and
THE IRVING TRUST COMPANY
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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In the

SUPREME COURT OF THE UNITED STATES

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No. ———

STATE OF OHIO, on the relation of Paul T. Klapp, Prosecuting Attorney,

Petitioner,

vs.

THE DAYTON POWER & LIGHT CO., and THE IRVING TRUST COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner, the State of Ohio on the relation of Paul T. Klapp, Prosecuting Attorney of Miami County, Ohio, on behalf of the City of Piqua, Ohio, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the entitled cause on January 22, 1959.

OPINIONS BELOW

The opinions of the District Court and the Court of Appeals are as yet unreported. The District Court's first opinion, rendered on a motion for summary judgment, is printed at page 34a of the record. It's second opinion, on the merits, is printed at page 49a of the record. The opinion of the Court of Appeals is printed at page 3a.

JURISDICTION

The judgment of the Court of Appeals was entered January 22, 1959. The jurisdiction of this Court is invoked under 28 United States Code, Section 1254 (1).

QUESTIONS PRESENTED

1. Whether a non-resident mortgagee may remove from the State to the Federal Courts an action where the plaintiff and a co-defendant mortgagor are both residents of the State.

2. Whether in an action so removed, the Courts below properly denied an Ohio municipality the right to oust an Ohio electric utility company from use of the city streets after termination of a franchise between the two, in the face of Ohio constitutional provisions granting municipalities "home rule" and the right to establish electric utilities for themselves and their inhabitants.

STATUTES INVOLVED

The statute governing removal of causes from the State to the District Court is appended hereto at page 7a, the slightly different form of the statute when this cause was removed is printed at page 7a hereof.

The Ohio Constitutional and statutory provisions involved are also appended hereto commencing at page 8a and pertinent references to them are hereinafter made.

STATEMENT OF THE CASE

There is no dispute of fact in this case, all material facts appearing either as a matter of record or by stipulation of the parties.

For convenience, the petitioner will be referred to as the "City of Piqua" or more simply as "Piqua". The defendant Ohio electric utility company will be referred to as the "Dayton Company" and the non-resident defendant, Irving Trust Company, will be referred to as the "Mortgagee".

On January 29, 1884 the Council of the City of Piqua by ordinance granted the Piqua Edison Illuminating Company the right to place its poles and wire in the streets and alleys of Piqua for transmission of electricity. (R. 28a). The Piqua Edison Illuminating Company has been succeeded, through several mesne conveyances, by the Dayton Company and it is stipulated that the Dayton Company succeeded to all of the rights and obligations of the original company. (R. 34a).

Following the grant of the 1884 franchise, the Dayton Company and its predecessors constructed poles and wires in the streets of Piqua and has ever since been using them for local distribution of electricity to some of the inhabitants of Piqua. The Dayton Company brings in its electricity from a plant outside the city of Piqua, (R. 30a) and in addition to its local distribution in Piqua, it transmits some electricity through the city to its lines and customers beyond the city. (R. 31a).

On October 25, 1933, Piqua commenced operation of its own electric utility plant to supply itself and its inhab-

itants. (R. 32a) and it now supplies in excess of 90% of the service in Piqua, the balance being supplied by the Dayton Company.

On January 16, 1933 the City Council of Piqua authorized its Director of Law to commence an action to prohibit the Dayton Company from continuing to use the municipal streets and alleys for local distribution of electricity. (R. 31a). Pursuant to such authorization this action was filed March 25, 1933 in the Court of Appeals of Miami County, Ohio. (R. 3a, 31a).

The petition sought to prevent local distribution of electricity to the city and its inhabitants (R. 4a) as did the amended complaint (R. 46a). The City confirmed by Stipulation in the Court of Appeals for the Sixth Circuit that it is not asking ouster of the Dayton Company's right to use Piqua streets for its main line transmitting electricity from outside the city, through the city and to Dayton Company's lines and customers beyond the city. 1a).

The original petition was against the Dayton Company alone. (R. 3a). However, in June 1911 the Dayton Company had issued a mortgage to the Knickerbocker Trust Company covering its assets including those in Piqua. On March 5, 1934, this Court in *Chase National Bank* v. *Norwalk, Ohio*, 291 U.S. 431, held that a mortgagee was not bound by a judgment rendered against a mortgagor, where the mortgagee was not a party to the action. Therefore, on motion of the City of Piqua, the Court of Appeals of Miami County, Ohio, made the mortgagee, Irving Trust Company, as successor to the Knickerbocker Trust Company, a party defendant (R. 13a) so there then became two defendants in the case.

Within the statutory time, the mortgagee removed the cause from the state court of Appeals of Miami County, Ohio, to the District Court for the Southern District of

Ohio, below. (R. 14a). The City promptly and seasonably moved to remand because there was no diversity the co-defendant, Dayton Company being a citizen of Ohio as was the plaintiff. (R. 18a). The District Court denied remand. (R. 27a).

Thereafter the Dayton Company and the co-defendant Mortgagee moved for summary judgment, largely upon the ground that the City had not first obtained the consent of the Public Utilities Commission of Ohio. Considering the motion the District Court found that the 1884 ordinance was a contract between Piqua and the Dayton Company; that under Ohio law the contract was terminable at will of either party; that the city having elected to terminate, it would be an unconstitutional impairment of the contract if the city were required to obtain consent of the Public Utilities Commission of Ohio since it had been created subsequently to the contract. (R. 34a). The District Court thereupon denied the motion of the Dayton Company and the Mortgagee for summary judgment and set the case for trial on the merits. (R. 43a).

At the trial on the merits, the defendants filed answers setting up 17 separate defenses. The District Court expressly refrained from passing upon 16 of the 17 defenses, holding that the third defense was determinative of the case. (R. 57a). The third defense was that Ohio municipalities in 1884 were creatures of the legislature and had only such powers as were expressly conferred by statute; that it was not until 1886 that the Ohio legislature had conferred upon cities the express right to grant a franchise for the use of streets and alleys for the transmission of electricity, hence the ordinance passed two years before in 1884 was ultra vires the City of Piqua, was void and could not thereafter be validated. Then, reasoned the District Court, there being no contract to be impaired, the City must obtain the consent of the

Public Utilities Commission of Ohio before the Dayton Company could be ousted from use of the city streets and alleys for distribution of electricity to inhabitants of Piqua. So holding, the District Court dismissed the complaint of Piqua. (R. 57a, 58a).

The Court of Appeals for the Sixth Circuit affirmed. (2a). The City now asks that certiorari issue to review the judgment of the Court of Appeals for the Sixth Circuit.

JURISDICTION OF DISTRICT COURT

This cause was removed from the state court to the District Court below on the ground of diversity of citizenship under 28 U. S. Code Section 1441 (b), formerly 28 U. S. Code Sec. 71.

REASONS FOR GRANTING THE WRIT

A. As to The Question of Removal From The State Court.

In upholding removal of this case from the state Court of Appeals of Miami County, both the District Court and the Court of Appeals for the Sixth Circuit deemed themselves required to do so by the decision in *Chase National Bank* v. *Norwalk, Ohio*, 291 U.S. 431, particularly by the statement of Mr. Justice Brandeis at pages 438, 439, that:

> "Obviously, the facts and considerations affecting the trustee's rights may be different from those presented to the state court on behalf of the Power Company. Because there is diversity of citizenship, the trustee under the mortgage is entitled to have the adjudication of his alleged rights made in the federal court."

The Courts below construed this to be a mandate from this Court that a non-resident mortgagee is entitled to an adjudication by the Federal Courts, regardless of whether

or not there are co-defendants from the same state as the plaintiff or whether there was a separable controversy.

We submit this is a misconception of the law enunciated by Mr. Brandeis in the *Norwalk* case.

The removal statute in its present form *28 U. S. Code*, Sec. 1441, provides:

> "(b). Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. *Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants* is a citizen of the state in which such action is brought." (Italics ours).

While the former removal statute, which was in effect when this cause was removed, did not contain the words italicised above, this Court from the time of the Removal Cases has consistently held that to permit removal *all* defendants must be non-residents and the presence of even one defendant, resident of the same state as the plaintiff, prevents removal. (*Removal Cases*, 100 U.S. 457; *Blake* v. *McKim*, 103 U.S. 336; *Hyde* v. *Rubel*, 104 U.S. 407; *Peper* v. *Fordyce*, 119 U.S. 469; *Handrick* v. *Handrick*, 153 U.S. 192.)

Under the form of the removal statute in effect in 1934 when this cause was removed, (Appendix hereto page 7a) if there was an actual, separable controversy the non-resident party could remove, but that provision has no application to the case here, since neither of the Courts below found there was any separable controversy. Indeed the only action taken by the Mortgagee below was to second the motion of the Dayton Company by adopting all of the defenses of the Dayton Company, (R. 49a) so there

is no possible claim that any separable controversy actually existed.

In *Chase National Bank* v. *Norwalk*, 291 U.S. 431, the plaintiff was a citizen and resident of New York, and the City of Norwalk, Ohio, *alone* was the defendant. (Opinion at page 434). There was of course, diversity of citizenship and Mr. Justice Brandeis' statement that "Because there is diversity of citizenship, the trustee under the mortgage is entitled to have the adjudication of his alleged rights made in the Federal Court," is literally correct, since there was no co-defendant resident of the same state as the plaintiff.

The Courts below misconstrued the statement to mean that the rights of a non-resident mortgagee were such that he was entitled to Federal Court adjudication of his rights regardless of the rule that the presence of a co-defendant citizen of the same state as the plaintiff prevents removal. In its opinion, the Court of Appeals below said (3a):

> "The mortgage which defendant executed to secure funds partly used for the operation in Piqua, was executed prior to the filing of this action. Defendant's mortgagee was therefore entitled to have its rights adjudicated in Federal Court. The successor mortgagee and trustee was entitled to the same remedy. *Chase National Bank* v. *City of Norwalk*, opinion by Mr. Justice Brandeis, 291 U.S. 431. If the non-resident mortgagee is entitled to have its rights adjudicated in the Federal Court a fortiori the mortgagee or its successor is entitled to removal."

It is respectfully submitted that the Courts below misconstrued the decision of this court in *Chase National Bank* v. *Norwalk*, and that this Court did not intend to overturn the century old rule, now codified in the removal statute,

that the presence of a co-defendant citizen of the same state as the plaintiff prevents removal from the State to the Federal court. If this Court did intend to overturn that rule, then it should be clearly so declared by this Court; if this Court did not intend to overturn that old rule, the Court of Appeals below is in error, and its erroneous statement of the law governing removal should not stand.

B. As to Denial of Relief to The Municipality

By removal of this cause from the Court of Appeals of Miami County, Ohio, the Federal courts below effectively prevented the municipality from having a judicial determination of its rights by the Ohio courts. Then by dismissing the complaint the courts below effectively denied judicial relief to the municipality in the federal courts. If there is not to be a miscarriage of justice it is imperative that the decision below should not be in conflict with the Ohio Constitution and law. We submit that the decision below is in conflict with applicable Ohio law and it becomes necessary to briefly examine that law.

1. The decision below is in conflict with Ohio Constitution, Art. XVIII, Sections 3, 4 and 7 and with decisions of the Supreme Court of Ohio relating thereto.

Until 1912 all Ohio municipalities derived their powers from the legislature. In 1869 laws applying to municipalities generally were codified in the Municipal Code. (66 *Ohio Laws*, 145; 28 *Ohio Jurisprudence*, Sec. 119, p. 227). In 1878 there was a general revision of the Municipal Code (75 *Ohio Laws* 161) and again in 1902. (96 *Ohio Laws* 20).

In 1912 Ohio amended its Constitution to provide that municipalities could adopt their own charters and by doing so have "home rule" independent of legislative control.

(*Ohio Const. Art. XVIII*, Sec. 7 and 3 printed in the Appendix hereto at page 8a).

In addition, municipalities were given the constitutional right to construct, own, lease and operate public utilities for themselves and their inhabitants, or to contract for the same. (*Ohio Const. Art. XVIII*, Sec. 4, quoted at page 8a of the Appendix hereto).

Since these are constitutional provisions, the Supreme Court of Ohio has held that the Ohio legislature may not restrict the right of municipalities to operate utilities for itself and its inhabitants, or to contract or not to contract therefor. *Board of Education* v. *Columbus*, 118 O.S. 295, approving *Euclid* v. *Camp Wise Ass'n*, 102 O.S. 207; *State, ex rel, Canada* v. *Phillips*, 168 O.S. 191, syllabus 4, decided July 9, 1958.

It is stipulated that on July 30, 1929, the City of Piqua adopted the charter form of government pursuant to the Constitutional provisions. (R. 28a).

In 1919 the Ohio legislature enacted the "Miller Act" creating a public utilities commission and giving it jurisdiction over public utilities, including electric power and light companies. However, in deference to the constitutional grant to municipalities above mentioned the legislature has expressly excluded municipal public utilities from the jurisdiction of the Public Utilities Commission. (Ohio Rev. Code, Section 4905.02 printed at page 9a of the appendix hereto).

Recognizing the powers of municipalities over their own local affairs, the jurisdiction confided to the Public Utilities Commission was expressly limited to the *main line*, which of course, is the one that leads through the city and on beyond and which thereby affects sections of the state outside the particular municipality. (Ohio Rev. Code Sec. 4905.20 printed at page 9a hereof).

Construing these constitutional and statutory provisions the Supreme Court of Ohio has made the following pronouncements of the law of Ohio:

That the legislature is without power to limit the constitutional powers given to municipalities to acquire and operate utilities, or to contract (which would include the power to not contract) for such services. *Board of Education* v. *Columbus*, 118 O.S. 295 (1928).

That the legislature is without power to limit the constitutional grant to municipalities of "powers of local self-government." *State ex rel. Canada* v. *Phillips*, 168 O.S. 191, syllabus 4, (July 9, 1958).

That the Public Utilities Commission is solely a creature of the legislature and may exercise no jurisdiction beyond that conferred by statute. *A & B Belt Rd.* v. *P. U. C.*, 165 O.S. 316, (May 31, 1956).

That jurisdiction has been conferred on the Public Utilities Commission only over the *main line* running through the city and beyond and it has no jurisdiction over spur lines for local distribution. *Toledo* v. *P. U. C.*, 135 O.S. 57 (1939) and *In re Train Service*, 161 O.S. 332 (1954).

As noted above, the City of Piqua in this action does *not* seek to oust the Dayton Company from use of the streets for the main electric line through the city, but only from use of the streets for local distribution to the inhabitants of Piqua. The decision below is in conflict with these applicable Ohio constitutional provisions governing municipalities and ought not to stand, particularly since the Courts below removed the case from the State Courts where the City would have had judicial determination of its rights.

2. The decision below is in conflict with Ohio General Code, Sections 9195 and 9196 and with decisions of the Supreme Court of Ohio in EAST OHIO GAS CO. v. AKRON, 106 O.S. 469 and NEW YORK CENTRAL RD. v. BUCYRUS, 126 O.S. 559.

In its opinion on the motion for summary judgment the District Court correctly states (R. 39a) that under the law of Ohio expressed by the Supreme Court of Ohio in *East Ohio Gas Co.* v. *Akron*, 81 O.S. 35, and *East Ohio Gas Co.* v. *Cleveland*, 106 O.S. 489 the 1884 ordinance constituted a contract between Piqua and the Dayton Company; that this contract could be terminated at the will of either party; that the contract having been entered into in 1884 prior to the passage of the act establishing the Ohio Public Utilities Commission in 1919, it would be an unconstitutional impairment of the contract to require the City to first obtain consent of the Utilities Commission before terminating the contract and requiring ouster of the Dayton Company from use of the city streets.

However, at the subsequent trial on the merits, the District Court, solely on the basis of the third defense, found that the 1884 ordinance was ultra vires the City of Piqua at the time it was passed and that it could not be subsequently validated. Hence, the Court below concluded there was no contract to be impaired by requiring the city first to apply to the Utilities Commission and it therefore dismissed the City's Amended Complaint.

The District Court reached its conclusion (R. 53a) that the 1884 ordinance was ultra vires largely on the strength of an Ohio lower court decision in *Brush Electric Light Co.* v. *Jones, etc.*, 5 Ohio Circuit Court 340, 341, where it was held that there was no express legislative authority to municipalities to grant permission to erect poles and

wires for electricity until 1886 — two years after the 1884 ordinance was passed.

The Court of Appeals for the Sixth Circuit in affirming said (5a) "The long use of the streets by the defendant and its predecessors did not create a valid contract."

In so deciding the Courts below are in conflict with the provisions of Ohio General Code 9195 and 9196 which were in effect when this action was filed and until October 1, 1953.

> "*G.C. 9195.* A company organized for the purpose of supplying electricity for power purposes, and for lighting the streets and public and private buildings of a city or village may manufacture, sell and furnish the electric light and power required therein for such purposes and with the consent of the city or village, under such reasonable regulations as it prescribes, also construct lines for conducting electricity for power and light purposes through the streets, alleys, lanes, lands, squares and public places of such city or village, by the erection of the necessary fixtures, including posts, piers and abutments necessary for the wires."
>
> "*G.C. 9196. Prior contracts declared valid.* When contracts for electric lighting have been heretofore entered into in which there is an omission or error from want of conformity to the statutes of this state, but which contracts have been made as herein required, and when by reason of the expenditure of money or labor in the performance of such contracts, or on any other account, it is just and equitable fully to execute them, in such cases the courts are authorized to uphold such contracts as binding on all parties to them and to carry them into effect as though no such defect, omission or error existed, any law of this state to the contrary notwithstanding."

The origin of the above provisions is an amendment to the 1886 law authorizing municipalities to permit use of their streets for electric wires, as mentioned in the *Brush* case above. Such amendments are to be found in 92 *Ohio Laws*, 291. The provisions quoted have now been carried, in slightly different form, into Ohio Revised Code Sections 4931.20 and 4933.14, effective October 1, 1953.

Independently of statute, the Supreme Court of Ohio has held that the party accepting the fruits of an invalid ordinance will not be permitted to question its validity. *New York Central Rd.* v. *Bucyrus*, 126 O.S. 559, where it is said in syllabus 4:

> "The legislative act of April 9, 1880 and the proceedings of the village thereunder were constitutionally invalid; but conceding them to be so, since the party so claiming their constitutional invalidity received and still holds the fruits of the agreement made thereunder, it is estopped from questioning the constitutionality of the law or the proceedings of the village."

These principles of Ohio law are but an illustration of generally accepted principles. Compare the decisions of this Court in *U. S.* v. *San Francisco*, 310 U.S. 16 at 30, 31 (1940); *Ashwander* v. *T.V.A.*, 297 U.S. 288 at 348 (1936) and *Fahey* v. *Mallonee*, 332 U.S. 245 (1947) holding those who avail themselves of the benefits of a law will not be heard to question its validity.

The Courts below ignored these clear Ohio statutory and judicial principles although the parties here for fifty years prior to institution of this action had accepted the 1884 ordinance as if it were valid and the Dayton Company has had and still retains the benefits thereunder.

By permitting removal of the cause from the State Court, the City of Piqua has been prevented from obtaining the

judicial relief to which it is entitled under clear Ohio law, and the decision of the Court below refusing to follow these applicable Ohio Constitutional, statutory and judicial decisions should not stand.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT HOUSTON FRENCH
Counsel for Petitioner
HAVETH E. MAU
R. K. WILSON
Of Counsel for Petitioner.

Cincinnati, Ohio
April 14, 1959

APPENDIX

PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CAUSE ARGUED AND SUBMITTED

December 4, 1958

Before: ALLEN and SIMONS, Circuit Judges, and GOURLEY, District Judge.

This cause is argued by Robert H. French for appellant and by J. R. Newlin and Franklin L. Shipman for appellees and is submitted to the court.

STIPULATION

(Filed December 22, 1958)

It is stipulated by the appellant that in this action it does not ask removal from the streets, alleys, lanes, commons and other public places of the City of Piqua, Miami County, Ohio, of such poles, guy wires, transformers, standards, wire and other appurtenances, equipment and apparatus of the appellees, The Dayton Power & Light Company, as are required for transmission by it of electricity from a point or points outside the corporate limits of said city, through said city, to points outside the corporate limits of said city for distribution of electricity to customers of said Dayton Power & Light Company outside the corporate limits of the said city, a plat of which

transmission lines through the said city is hereto attached, made part hereof, marked Exhibit "A" and initialled by attorneys for the appellant and the appellees.

The appellant does not hereby waive its right at any future time in any proper action to seek removal of the foregoing if the appellees, The Dayton Power & Light Company, should hereafter build or otherwise acquire distribution lines outside the corporate limits of the City of Piqua, Ohio, so that electricity may be transmitted to such customers outside of the city without the necessity of transmitting the same through said city.

/s/ R. K. WILSON
/s/ HAVETH E. MAU
/s/ ROBERT HOUSTON FRENCH
Attorneys for Appellant

Have seen:
/s/ FRANKLIN L. SHIPMAN
/s/ JULIAN de BRUYN KOPS
/s/ J. R. NEWLIN
Attorneys for Appellees

JUDGMENT

(Filed January 22, 1959)

Appeal from the United States District Court for the Southern District of Ohio.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Ohio, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

OPINION OF THE UNITED STATES COURT OF APPEALS, FOR THE SIXTH CIRCUIT

(Filed January 22, 1959)

Before ALLEN, Chief Judge, SIMONS, Circuit Judge, and GOURLEY, District Judge.

PER CURIAM. In an action quo warranto originally filed in the state court the District Court, after removal and eventual hearing on the merits, gave judgment for defendant.[1] Defendant, and its predecessors, electric light and power companies, had operated in Piqua, Ohio, for nearly 50 years in accordance with an ordinance of the city. In this action the city sought to oust defendant from the streets and public places of the city and to force defendant to remove its poles and other equipment from such streets and public places upon or over the ground. A later stipulation joined in by the city excepts from the prayer for removal equipment used to carry electric power through Piqua on its way to points beyond the city.

Relator, representing Piqua, joined a nonresident trust company incorporated in New York State, successor to defendant's mortgagee and trustee for bondholders, as defendant in the action. The nonresident mortgagee and trustee in turn removed the case to the District Court. A motion by relator to remand the case to the state court was later denied. We think this action was correct. The mortgage which defendant executed to secure funds partly used for the operation in Piqua, was executed prior to the filing of this action. Defendant's mortgagee was therefore entitled to have its rights adjudicated in federal court. The successor mortgagee and trustee was entitled to the same remedy. *Chase National Bank* v. *City of Norwalk*, opinion by Mr. Justice Brandeis, 291 U.S. 431. If the non-

[1] The parties will be denominated as in the court below.

resident mortgagee is entitled to have its rights adjudicated in the federal court *a fortiori* the mortgagee or its successor is entitled to removal.

In the original action defendant's answer relied upon the alleged fact that a valid contract or franchise to operate in Piqua was embodied in an ordinance duly enacted in 1884 and accepted by defendant's predecessor. After numerous amendments and supplemental proceedings defendant shifted its position on this point and asserted in its final answer that the ordinance of 1884 was invalid, that no contract between defendant and Piqua existed and that the city had not applied to the Public Utilities Commission of Ohio for relief, as required by Sections 4905.20 and 4905.21, Revised Code of Ohio. These sections require that in case abandonment, withdrawal or closing of service of a public utility is sought, permission must be secured from the Public Utilities Commission of the State of Ohio for such withdrawal or abandonment. If the contract was valid and existed when this action was filed the Miller Act would not apply, for under such circumstances the application of the sections cited would impair the obligation of the contract. *The East Ohio Gas Company* v. *The City of Cleveland*, 106 O.S. 489. The District Court held that no valid contract existed between the parties when the action was filed and that this point disposed of the case.

Relator in its original petition had denied the existence of any valid contract between the city and defendant, but in its final amended complaint it shifted its position and claimed that the contract was valid but had been terminated by the city in 1933. It attacks the judgment herein upon the ground that the contract was valid and that defendant was estopped to plead the invalidity of the ordinance and the contract.

We do not discuss this contention at length but refer to the scholarly opinion of the District Court after trial upon

the merits, with its excellent discussion of the legal questions involved. As rightly found by the court, the city was in no way misled by defendant's shift in position. The city itself had radically altered its theory of the case for the purpose of trial on the merits and neither party was prejudiced by this mutual change of position. Both defendant and the city had derived advantages from defendant's use of the streets of Piqua. Moreover, as found in effect by the District Court, the equities preponderate in favor of defendant. If ordered to remove its equipment defendant will have nothing but the salvage value and it is estimated that its loss will be $425,000.

The conclusion of the District Court that the ordinance of 1884 was invalid is supported by the applicable Ohio law. Ohio cities had no power in 1884 to pass an ordinance bestowing a franchise upon a public utility company for the use of the city streets. *Ravenna* v. *Pennsylvania Company*, 45 O.S. 118; *Billings* v. *The Cleveland Railway Company*, 92 O.S. 478. The long use of the streets by defendant and its predecessors did not create a valid contract. Since in 1933 no contract existed between the parties, the Miller Act, 4905.21, Ohio Revised Code, applies and the city is required to seek from the Public Utilities Commission permission for the proposed withdrawal of service by defendant. Cf. *City of Cincinnati* v. *Public Utilities Commission of Ohio*, 137 O.S. 437.

The judgment is affirmed upon the grounds and for the reasons stated in the decision of the District Court filed August 2, 1957, and in the decision overruling motion for new trial filed December 11, 1957.

CERTIFICATE OF CLERK

UNITED STATES COURT OF APPEALS
For The Sixth Circuit

I, Carl W. Reuss, Clerk of the United States Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of appendices and proceedings in the case of STATE OF OHIO, on the Relation of Paul T. Klapp, Prosecuting Attorney, vs. THE DAYTON POWER AND LIGHT COMPANY, et al., No. 13,516, as the same remains upon the files and records of said United States Court of Appeals for the Sixth Circuit, and of the whole thereof.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of said Court at the City of Cincinnati, Ohio, this 31st day of March, A.D., 1959.

CARL W. REUSS
Clerk of the United States Court
of Appeals for the Sixth Circuit.

(SEAL)

REMOVAL STATUTE

28 U. S. Code, Sec. 1441 (b)

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the state in which such action is brought."

FORMER REMOVAL STATUTE

28 U. S. Code, Sec. 71 (repealed Sept. 1, 1948; 62 Stat. 992)

"**Removal of suits from State Courts.** Any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the district courts of the United States are given original jurisdiction, in any State Court, may be removed by the defendant or defendants therein to the district court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the district courts of the United States are given jurisdiction, in any State Court, may be removed into the district court of the United States for the proper district by the defendant or defendants therein, being non-residents of that state. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy

may remove said suit into the district court of the United States for the proper district. * * *"

OHIO CONSTITUTION
(From Pages Ohio Revised Code, Appendix)

Article XVIII, Section 3, Adopted Sept. 3, 1912:

"Sec. 3, Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

Article XVIII. Section 4, Adopted Sept. 3, 1912:

"Sec. 4. Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service. The acquisition of any such public utility may be by condemnation or otherwise, and a municipality may acquire thereby the use of, or full title to, the property and franchise of any company or person supplying to the municipality or its inhabitants the service or product of any such utility."

Article XVIII, Section 7, Adopted Sept. 3, 1912:

"Sec. 7. Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of Section 3 of this article, exercise thereunder all powers of local self-government."

MILLER ACT

Revised Code, Section 4905.02 (formerly General Code, Sec. 614-2a)

"As used in Sections 4905.01 to 4905.64, inclusive, of the Revised Code, 'public utility' includes every corporation, company, copartnership, person, or association, their lessees, trustees, or receivers, defined in section 4905.03 of the Revised Code, including all telephone companies, but excepting such other public utilities as operate their utilities not for profit, such other public utilities as are owned or operated by any municipal corporation, and railroads as defined in sections 4907.02 and 4907.03 of the Revised Code.

Revised Code, Sec. 4905.20 (General Code, Sec. 504-2)

"No railroad as defined in Section 4907.02 of the Revised Code, operating any railroad in this state, and no public utility as defined in Section 4905.02 of the Revised Code furnishing service or facilities within this state, shall abandon or be required to abandon or withdraw any main track or depot of a railroad, or main pipe line, gas line, telegraph line, telephone toll line, electric light line, water line, steam pipe line, or any portion thereof, pumping station, generating plant, power station, or service station of a public utility, or the service rendered thereby, which has once been laid, constructed, opened, and used for public business, nor shall any such facility be closed for traffic or service thereon, therein, or thereover except as provided in section 4905.21 of the Revised Code. Any railroad or public utility violating this section shall forfeit and pay into the state treasury not less than one hundred dollars, nor more than one thousand dollars, and shall be subject

to all other legal and equitable remedies for the enforcement of this section and section 4905.21 of the Revised Code."

Revised Code, Sec. 4905.21 (General Code, Sec. 504-3)

"Any railroad or any political subdivision desiring to abandon, close, or have abandoned, withdrawn, or closed for traffic or service or of any part of a main track or depot, and any public utility or political subdivision desiring to abandon or close, or have abandoned, withdrawn, or closed for traffic or service or of any part of any line, pumping station, generating plant, power station, or service station, referred to in Section 4905.20 of the Revised Code, shall make application to the public utilities commission in writing. The commission shall thereupon cause reasonable notice of the application to be given, stating the time and place fixed by the commission for the hearing of said application

Upon the hearing of said application, the commission shall ascertain the facts and make its finding thereon, and if such facts satisfy the commission that the proposed abandonment, withdrawal, or closing for traffic or service is reasonable, having due regard for the welfare of the public and the cost of operating the service or facility, it may allow such abandonment, withdrawal, or closing; otherwise it shall be denied, or if the facts warrant, the application may be granted in a modified form If the application asks for the abandonment or withdrawal of any main track, main pipe line, gas line, telegraph line, telephone toll line, electric light line, water line, steam pipe line, pumping station, generating plant, power station, service station, or the service rendered thereby, in such manner

as can result in the permanent abandonment of service between any two points on such railroad, or of service and facilities of any such public utility, no application shall be granted unless the railroad or public utility has operated said track, pipe line, gas line, telegraph line, telephone toll line, electric light line, water line, steam pipe line, pumping station, generating plant, power station, or service station for at least five years. Such notice shall be given by publication in a newspaper of general circulation throughout any county or municipal corporation which has granted a franchise to said railroad or public utility, under which said track, pipe line, gas line, telegraph line, telephone toll line, electric light line, water line, steam pipe line, pumping station, generating plant, power station, or service station is operated or in which the same is located, once a week for four consecutive weeks before the hearing of said application. Notice of said hearing shall be given such county, municipal corporation or public utility in the manner provided for the service of orders of the commission in section 4905.53 of the Revised Code. This section and section 4505.20 of the Revised Code do not apply to a gas company when it is removing or exchanging abandoned field lines.

The provisions of this section shall apply to all service now rendered and facilities furnished or hereafter built and operated and an order of the public utilities commission authorizing the abandonment or withdrawal of any such service or facility shall not affect rights and obligations of a railroad or public utility beyond the scope of said order, anything in its franchise to the contrary notwithstanding."

OHIO MUNICIPAL CODE
(As Revised in 1878, 75 Ohio Laws 161 et seq.)

Chapter 3, Section 1:

"In addition to the powers specifically granted in this title . . . cities and villages shall have the general powers enumerated in this section and the council may provide by ordinance for the exercise and enforcement of the same:

* * *

"18. . . . to light streets, alleys, public grounds."

Chapter 13, Section 1:

"The council shall have the care, supervision and control of all public highways, streets, avenues, alleys, sidewalks, public grounds and bridges within the corporation . . ."